

BEFORE THE FEDERAL AVIATION ADMINISTRATION

IN THE MATTER OF:)

BEHIND THE SCENES WORLDWIDE LOGISTICS.)

) **FAA Case No. 2017SW700032**

) **FAA Docket No. FAA-2021-0405**
)

RESPONDENT'S RESPONSE IN OPPOSITION TO THE
ADMINISTRATOR'S AMENDED MOTION TO DISMISS
RESPONDENT'S REQUEST FOR HEARING

COMES NOW, Respondent Behind the Scenes Worldwide Logistics [hereinafter, "Behind the Scenes"] by and through its attorneys of record and pursuant to 14 C.F.R. § 13.16 and § 13.49, hereby submits its Response in Opposition to the Administrator's Motion to Dismiss Respondent's Request for a Hearing on the Final Notice of Proposed Civil Penalty against it.

I. BACKGROUND

The instant matter is about the shipment of certain hazardous materials on or about February 28, 2017¹. The FAA issued its Letter of Investigation [hereinafter, "LOI"] into this matter on March 2, 2017. *See* Certified LOI dated March 2, 2017 at **Exhibit A**. Respondent received the LOI via email from Special Agent John Finch on April 14, 2017. *See* Email Exchange dated April 14, 2017 at **Exhibit B**². Respondent, through its President Bryan Sweet, timely responded to the LOI explaining how the shipments were made and argued that many of the allegations were false; the shipments were properly declared. *See* Email from Bryan Sweet to Special Agent John Finch dated April 21, 2017 at **Exhibit C**. This email included the relevant safety data sheets. *Id.* There were no communications between the FAA and Respondent between the time Respondent answered the LOI (April 21, 2017) and when the FAA issued its Notice of

¹ The Letter of Investigation alleges the shipment occurred on or about February 28, 2017, and the Notice of Proposed Civil Penalty and Final Notice of Proposed Civil Penalty alleges the shipments occurred on or about February 25, 2017.

² Any and all redactions in the exhibits are confidential communications protected by attorney client privilege.

Proposed Civil Penalty [hereinafter, “NOPCP”] on or about February 5, 2018. *See* NOPCP at **Exhibit D**. However, with the lapse of time, Respondent does not know when he received the NOPCA, but he requested an informal conference on February 5, 2019, with FAA Attorney Yolanda Bernal. *See* Email with Reply Form at **Exhibit E**.

The informal conference was later scheduled for May 8, 2019, but inexplicitly and due to no fault of the Respondent it was cancelled the day before. *See* Email Chain from Attorney Bernal at **Exhibit F**. A brief, but not complete informal conference took place on May 11, 2019. Respondent has no record of this conference, but it was to finish the informal conference at another time. It is Respondent’s understanding and belief that Attorney Bernal retired, and this matter was transferred to the current attorney of record, Senior Attorney James Archier.

On September 26, Attorney Archier scheduled an informal conference for October 23, 2019. *See* Email from Attorney Archier at **Exhibit G**. Attorney Archier sent Respondent a confirmation of the scheduled Informal Conference on September 30, 2019. *See* Email dated September 30, 2019 from Attorney Archier at **Exhibit H**. The confirmation letter attached to that email warns:

A request to reschedule a telephonic informal conference will not be routinely granted. If circumstances prohibit you from participating in the telephonic informal conference at the date and time indicated above, please contact the undersigned within 7 days of the date of this Notice.

The October informal conference was also cancelled by the FAA. The next time Respondent heard anything about this case was when it received the Final Notice of Proposed Civil Penalty [hereinafter, “FNPCP”], dated June 29, 2021³. Since that time Mr. Sweet had been

³ On or about August 19, 2021, upon advice of counsel Mr. Sweet scanned all of his emails in an effort to locate any documents relevant to this matter and found an email in his junk file from Attorney Archier. That email is dated June 15, 2021, and in it, Attorney Archier wrote: “I am contacting you regarding the above-captioned case with the

diligently trying to find counsel that could assist Respondent in this matter. It should be noted and considered that the COVID-19 Pandemic had impacted his ability to find counsel versed in FAA law. The FAA should understand these limitations as the FNPCP cautions:

**** DUE TO THE ONGOING COVID-19 PANDEMIC, RELATED STATE AND FEDERAL ORDERS, AND PUBLIC HEALTH CONSIDERATION, THE FAA'S ABILITY TO RETRIEVE AND SEND MAIL IS LIMITED. TO THE EXTENT POSSIBLE, PLEASE SERVE ALL CORRESPONDENCE TO THE ASSIGNED FAA ATTORNEY BY E-MAIL.****

Respondent retained counsel on August 19, 2021, the date of its Request for Hearing to the FAA. It had always been Mr. Sweet's understanding that he was entitled to an informal conference with the FAA to show that most of the violations alleged against it have meritorious defenses and to show that a \$88,500.00 civil penalty against Respondent, a small business is an extreme hardship. Further, he did not understand that the FAA would deem a late request for a hearing as a default for the full amount of the "proposed" civil penalty. These statements in this section have been verified by Mr. Sweet. *See Sweet Declaration at Exhibit I.*

II. ARGUMENT

The Administrative Law Judge [hereinafter, "ALJ"] should grant Respondent's Request for Hearing and deny the Administrator's Motion to Dismiss in the interest of justice and for good cause shown. "Good cause is a "nebulous" standard. It is an evaluation that rests within the discretion of the trial court since there is a **preference for deciding cases on their merits.**" *In the Matter of Boca Helicopters, Inc.*, Docket No. FAA-2017-0093; Case No. 2015EA010023, *27 (May 16, 2019). (Emphasis added) (Internal quotations omitted). "In evaluating good cause, there

Federal Aviation Administration. Would you please call me at (817) 319-5044? Thank you." Mr. Sweet did not contact Attorney Archier because by that time he was represented by counsel.

is "no fixed, rigid standard" that can anticipate "all the situations" which might arise for a party's failure to file a timely answer. Therefore, in determining whether good cause exists or does not exist, the court looks at multiple factors. *Id.* *27-28. In *Matter of Boca Helicopters, Inc.*, the respondent therein made its request for a hearing out of time and at the time he was not represented by counsel; its managing partner made numerous requests for the FAA to provide him instructions on how to request a herein. The ALJ found that the FAA knew respondent wanted a hearing on the merits of his case and granted respondent's request for an out of time hearing.

The present case is analogous to *Matter of Boca Helicopters, Inc.* Respondent timely responded to the LOI with explanation/defenses to the alleged violations. See **Exhibit C**. Respondent also requested informal conferences in response to the February 2018 NOPCP. See **Exhibit E**. Respondent participated in an abbreviated informal conference, such that another one was scheduled. See **Exhibit F**. The October 23, 2019 scheduled informal conference was never conducted. In fact, all but one scheduled conference was cancelled by the FAA, whereas Respondent was always will and able to participate in them.

Since Respondent received the FNPCA, its managing partner, a lay person, had tried diligently to retain counsel to help defend this matter, but it wasn't until August 19, 2021, when he secured undersigned counsel. The Request for Hearing was served that day. Respondent's managing partner did not understand that the FAA would deem his small business in default if a request for a hearing was not sent within 15 days. Further the difficulty in retaining counsel was all exacerbated by the COVID restrictions, which the FAA is clearly aware of and the ALJ should consider. See *In the Matter of Beach Aviation, LLC*, Docket No. FAA-2015-1325; Case No. 2013S0950071.

Therefore, in determining whether good cause exists or does not exist, **the court may consider many factors**, including (but not limited to) the **nature of the default, whether there is a meritorious defense, whether the opposing party will be prejudiced, the timeliness of the request for relief, the amount involved in the litigation, as well as the availability and effectiveness of less drastic solutions.**

(Emphasis added) (Internal citations omitted).

All of the factors set forth in *Matter of Beach Aviation, LLC*, weigh heavily in favor of finding good cause and granting Respondent's Request for Hearing. 1) Respondent's managing partner, a lay person (no legal education and not an attorney) had a difficult time finding counsel that could defend this specialized FAA matter. 2) The FAA cannot argue it is somehow prejudiced as the allegations against Respondent were known to the FAA as early as April 2017 and it served its FNPCA more than four years later whereas the alleged untimeliness of the Request for Hearing is just over one month. 3) The amount of the civil penalty, almost \$90k against Respondent, a small business, will be an extreme hardship. 4) Finally, there is a less drastic solution, granting Respondent's Request for Hearing so it can defend the allegations on the merits.

“Other considerations in evaluating good cause (not inclusive) may include the inaction of a party's counsel, a party's mistaken belief about the time requirements, the willfulness of the party's non-compliance, **any factors demonstrating excusable neglect, surprise, or inadvertence, or a party's erroneous reliance on settlement negotiations.**

Id. * 5 citing 29 A.L.R. Fed. 7, *Sufficiency of Particular Reasons for Inaction*, §§ A and B (1976). (Emphasis added) (other citations omitted).

Therefore, in determining whether good cause exists or does not exist, the court may consider many factors, including (but not limited to) the nature of the default, whether there is a meritorious defense, whether the opposing party will be prejudiced, the timeliness of the request

for relief, the amount involved in the litigation, as well as the availability and effectiveness of less drastic solutions.

The FAA's hardline in this matter is unreasonable and not in the interest of justice. Respondent is a small business and its managing partner had been working with the FAA since April 2017 to resolve this matter. The FAA rescheduled at least three informal conferences, none at Respondent's request of fault. The relevant federal aviation regulations (FARs) do not require the FAA to issue an Order, it instead that it may do so. *See* 14 C.F.R. § 13.16:

(d) Order assessing civil penalty. An order assessing civil penalty may be issued for a violation described in paragraphs (a) or (c) of this section ... after notice and opportunity for a hearing. A person charged with a violation may be subject to an order assessing civil penalty in the following circumstances:

...

(2) An order assessing civil penalty may be issued if a person charged with a violation does not request a hearing under paragraph (g)(2)(ii) of this section within 15 days after receipt of a final notice of proposed civil penalty. (Emphasis added).

III. CONCLUSION

Respondent, a small business will suffer extreme hardship if the Request for Hearing is not granted. Respondent has good cause for its short but untimely filing of its Request for Hearing. Considering all of the facts herein and the applicable law, the ALJ should deny the Administrator's Motion to Dismiss and grant Respondent its request for Hearing.

WHEREFORE, Respondent Behind the Scenes respectfully request the law judge deny the Administrators' Motion to Dismiss and grant Respondent's Request for Hearing on the merits and for any other relief the law judge deems just and proper.

Respectfully submitted,

COOLING & HERBERS, P.C.

//s// Elizabeth A. Vasseur-Browne

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ATTORNEYS FOR RESPONDENT

BEHIND THE SCENES

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CERTIFICATE OF SERVICE

I hereby certify that on the 27th day of August 2021, the foregoing was sent via email to:

Federal Aviation Administration
800 Independence Avenue, SW.
Washington, DC 20591
Attention: Hearing Docket Clerk, AGC-430,
Wilber Wright Building—Suite 2W1000
Email: 9-AGC-FAA-HearingDocket@FAA.gov

-And-

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//s// Elizabeth A. Vasseur-Browne
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